IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.81 OF 2007

Nasir Husain Films Pvt.Ltd .. Petitioners

vs

1. Saregama India Pvt.Ltd .. Respondents
2. Phonographic Performance Limited

Mr.F.Divetre a/w Mr.Nishad Nadkarni and Mr.Sriram Panyam i/b DSK Legal for Petitioners Mr.Janak Dwarkadas,Sr,counsel a/w Mr.Sharan Jagtiani with Mr.Chakropani Misra, Mr.Vishal Maheshwari i.b Khaitan & Co for Respondents

CORAM : ANOOP V.MOHTA, J

RESERVED ON : 27th April, 2007
PRONOUNCED ON: 4th May, 2007

JUDGMENT

1. The present Petition which is under section 9 of the Arbitration and Conciliation Act 196 (for short Arbitration Act).

2. Based on the agreement dated 8th May, 2006 for assignment and exploitation of copy rights and sound recording and underlying works, the petitioner has sought an interim order upon initiation hearing and final disposal of the arbitration proceedings and making of the award and/or implementation thereof, respondent no.1 be ordered to disclose within 15 days on affidavit complete details of the royalties due to the petitioners and deposit in court all royalties payable to the petitioners under the Assignment

Deed including those dues under clause 6 (a) and 6 (j) of the Assignment Deed. The petitioners have not pressed prayer clauses (a) and (b). Therefore, made restricted submissions by the counsel for the parties.

3. Respondent no.1 is a company incorporated and registered under the provisions of the Companies Act, 1956 with its registered office at 33, Jessore Road, Dum Dum, Kolkata-700 028. Respondent no.1 is carrying on the business inter alia, as a music company. Respondent no.2 is a copyright society as per the provisions of the Copy Rights Act, 1957 (hereinafter referred to as the "Copy Right Act) and represents the interests of its member music companies and inter alia, assists its member music companies in the exploitation of copyrights and the collection and administration of royalties in respect thereof. Respondent no.1 is a member of Respondent no.2. Respondent no.2 also assists Respondent no.1 in the exploitation of copyrights and the collection of royalties for and on behalf of respondent no.1.

4. The petitioner is a famous and well known producer of Hindi cinematograph films and film songs. The petitioner has produced various blockbuster films. The petitioner has inter alia produced films which are listed in Exhibit A hereto and owns all copyrights in such films, filmsongs,

sound recordings in respect thereof and all its underlying works.

5. In or around the latter part of the year 2004, the petitioner was shocked to to know that respondent no.1 through respondent no.2, was exploting the petitioner's songs, music, lyrics and sound recordings thereof by various modes to specify ring tone though they were not authorised to do so under any previous agreements. Such unauthorised exploitation was, inter alia, through ring tones was not contemplated by the previous agreements. Such unauthorised exploitation not only amounted to breach of the terms of the previous agreements but also is in violation of the petitioner's copy rights in the songs and the music and the lyrics comprised therein and the sound recordings thereof. As alleged, not only did the respondents make unauthorised use and exploitation of the petitioner's songs but also did not make any payment or give compensation for such unauthorised use and exploitation.

6. The petitioners, therefore by various notices/letters called respondent no.1 to clear of the outstanding amount/royalties due to the petitioners under the previous agreement and further to cease and desist from making use and exploiting the petitioner's works/songs/music/lyrics, inter alia through or by

way of ringtones/ringtone down loadings thereof The respondents denied the petitioner's claim. Respondents failed to clear the the petitioner's dues and continued to wrongfuly and unauthorisedly exploit the petitioner's copy rights.

7. However, there were various negotiations and agreements reached between the parties. Various correspondences have been exchanged between the parties including e-mails. A draft of fresh agreement as negotiated have been exchanged between the parties as alleged and respondent no.1 agreed to all the terms of the fresh Assignment Deed. Admittedly, by letter dated 8th May 2006 sent to respondent no.1 two originals of the Deed of Assignment agreed by them with a request to return to the petitioners one original of the letter and the Deed of Assignment duly signed by respondent no.1. The Assignment Deed in question has been sent to letter dated 10th May, 2006. Respondent no.l however, failed to return the Assignment Deed duly executed by them though requested. The receipt of the said acknowledgment is not disputed. However, there was no response from respondent no.1. The petitioners, therefore by letter dated 14th June, 2006/14th July, 2006 requested respondent no.1 to comply with the various clauses of the said Assignment Deed. Respondent no.1 did not respond to the same again.

8. As respondent no.1 failed to comply to the

petitioner's letter dated 14th July 2006, the petitioner by its advocate's letter on 2nd March 2007 terminated the Assignment Deed and once again called respondent no.1 to clear all the outstanding royalties and invoke the arbitration between the parties as disputes and differences had arisen out of and connected with the Assignment Deed. There is an arbitration clause in the draft assignment Deed between the parties.

9. Learned counsel appearing for the respondents however, disputes the fact of existence of such a Assignment Deed and/or agreement for arbitration basically on the foundation that the Assignment Deed was never signed by the respondents. Reliance has been placed on section 7 of the Arbitration Act. The submission that there is no signed agreement between the parties and therefore, invocation of arbitration clause as done in the present case itself is wrong. There was no agreement for arbitration between the parties as the Assignment Deed itself was never signed by the parties at any point of time. Exchange of letters/correspondence or e-mails itself cannot be the foundation to treat those correspondences or communication as the agreement for arbitration as there is no agreement between the parties for arbitration, therefore, there is no question of granting any relief under section 9 of the Arbitration Act, 1996.

10. He has strongly relied on **Rickmers Verwaltung GMBH vs Indian Oil Corporation reported in (1999) 1 SCC 1.** The sumission is that mere negotiations cannot be considered as agreement between the parties. The same judgment itself spells out that the facts, circumstances and correspondences exchanged between the parties need to be cnosidered together with the intention of the parties. Correspondence as shown admittedly reflects that the Assignment Deed was never signed physically. Therefore, the question is whether there is an arbitration agreement between the parties.

11. Strong reliance has been placed further by learned sr. counsel appearing on behalf of the respondents that in view of case in **Pramod Chimanbhai Patel vs Lalit Constructions & anr reported in 2002 (3) Mh.L.J. 846** the Arbtiration agreement in writing must be signed by both the parties to have a binding force.

12. The apex court in **Dresser Rand S.A.vs.1.Bindal Agro Chem Ltd (2006) 1 Supreme Court Cases 751** interpreting section 7 of the Arbitration Act, 1996 has observed as under :

> 24. .....In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence witha view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the

court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except in so far as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence. "

30. The following observations of this Court in Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram though in a different context, are apposite: (SCR pp 820-21))

" The letters merely set out the terms on which the parties were ready to do business with each other if and when orders were placed and executed. As soon as an order was placed and accepted a contract arose. It is true this contract would be governed by the terms set out in the letters but until an order was placed and accepted there was no contract. "

39. It is now well settled that a letter of intent indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract. The Court while considering the nature of a letter of intent, observed thus in **Rajasthan Coop.Dairy Federation Ltd vs.Maha Laxmi Mingrate Marketing Service (P) Ltd (SCC p.408,para 7)**

" The letter of intent merely expressed an intention to enter into a contract..... There was no binding legal relationship between the appellant and Respondent 1 at this stage and the appellant was entitled to look at the totality of circumstances in

deciding whether to enter into a binding contract with Respondent 1 or not. "

13. Learned counsel appearing for the petitioner has relied on case reported in **(2005) 7 Supreme Court cases 234 234 Shin-etsu Chemical Co.Ltd vs Aksh Optifibre Ltd & anr** to support his submissions that there was agreement between the parties. The facts and circumstances are totally distinct and distinguishable. I am of the view that prima facie at this stage, without going into further details of the matter for the purpose of section 9 of the Arbitration Act, 1996 and considering the scope and purpose of the Act, there is no binding arbitration agreement between the parties. Non-signing of the basic document between the parties as reflected from the record just cannot be overlooked. Mere sending of final dragt of assignment deed based on some correspondences that itself, cannot be treated as binding agreement between the parties. The other party admittedly, though requested, yet not signed the same, till this date. Therefore, unless such draft/or proposal, though negotiated by mutual discussion, cannot bind the other party unless accepted and signed, as contemplated under the Arbitration Act.

14. I am of the view that parties at liberty to raise all these objections while submitting their rival contentions under section 11 of the Arbitration Act, 1996 if necessary.

15. Both the parties if agreed to appoint any Arbitrator then the submition that there was no agreement between the parties for arbitration or even otherwise, would be futile and of no use. Therefore, at this stage I am inclined to accept the submissions raised by learned counsel appearing for the petitioner that there is no binding arbitration agreement.

16. The settlement of draft itself cannot be treated as valid and binding agreement. Unless accepted in writing or communicated accordingly. Such draft of agreement cannot be treated as final and agreed agreement of arbitration as sought to be contended by the senior counsel for the petitioner.

17. However, Admittedly, the respondents have been using same copy right materials of the petitioners based on earlier agreements till this date. The respondents who are exploiting such copyrights of the petitioners is entitled to make the payment and/or royalties atleast damages to the petitioner even if they are not agreeing to the Assignment Deed but it is subject to proof. It is a fit case where the arbitrator or the mediator need to be appointed to settle the dispute and difference between the parties.

18. In this background, grant of prayer clause (c)

at this late stage is rejected. The petitioner is entitled to claim and raise all issues before appropriate forum ncluding arbitral tribunal if constituted. The parties are at liberty to take out appropriate steps or application if any case is made out.

19. The respondents and said persons are utilising and using the said copyright material since long. The agreement itself is of November, 2006. Present petition is dated 5th March, 2007. The averments are that the respondents are using the said copyright material initially based on the agreement between the parties. There is dispute between the Assignment Deed between the parties. Therefore, unless the issue is decided, exploitation of copy rights by the respondents at this stage, cannot be adjudicated or decided upon including royalties as claimed.

20. Taking all these into account, I am not inclined to grant any relief as prayed for in the present petition. The petition is dismissed. No costs.

(Anoop V.Mohta, J)